

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

DOMINIC BRIAN LeBLUE,

Plaintiff,

vs.

CATES, et al.,

Defendants.

1:21-cv-01430-GSA-PC

**ORDER FOR CLERK TO RANDOMLY
ASSIGN A UNITED STATES DISTRICT
JUDGE TO THIS CASE**

AND

**FINDINGS AND RECOMMENDATIONS
TO DISMISS THIS CASE, WITHOUT
PREJUDICE, FOR FAILURE TO COMPLY
WITH COURT ORDER**

(ECF No. 8.)

**OBJECTIONS DUE WITHIN FOURTEEN
DAYS**

Plaintiff, Dominic Brian LeBlue, is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on September 27, 2021. (ECF No. 1.)

On December 1, 2021, the court issued an order requiring Plaintiff to respond within thirty days and show cause why this case should not be dismissed as barred by the favorable termination requirement of Heck v. Humphrey, 512 U.S. 477 (1994) and Edwards v. Balisok, 520 U.S. 641 (1997). (ECF No. 8.) Plaintiff was granted two thirty-day extensions of time to respond to the order. (ECF Nos. 10, 12.) Both thirty-day time periods have now expired and

1 Plaintiff has not filed a response to the Court's order. Therefore, it will be recommended that
2 this case be dismissed for Plaintiff's failure to comply with the Court's order. The Clerk shall
3 be directed to randomly assign a United States District Judge to this case.

4 In determining whether to dismiss this action for failure to comply with the directives set
5 forth in its order, "the Court must weigh the following factors: (1) the public's interest in
6 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of
7 prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the
8 public policy favoring disposition of cases on their merits." Pagtalunan v. Galaza, 291 F.3d 639,
9 642 (9th Cir. 2002) (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992)).

10 "The public's interest in expeditious resolution of litigation always favors dismissal,"
11 id. (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)), and here, the
12 action has been pending since September 27, 2021. Plaintiff's failure to respond to the Court's
13 order may reflect Plaintiff's disinterest in prosecuting this case. In such an instance, the Court
14 cannot continue to expend its scarce resources assisting a litigant who will not comply with the
15 court's orders. Thus, both the first and second factors weigh in favor of dismissal.

16 Turning to the risk of prejudice, "pendency of a lawsuit is not sufficiently prejudicial in
17 and of itself to warrant dismissal." Id. (citing Yourish at 991). However, "delay inherently
18 increases the risk that witnesses' memories will fade and evidence will become stale," id., and it
19 is Plaintiff's failure to file an amended complaint or notify the court he wishes to proceed with
20 the excessive force claim that is causing delay. Therefore, the third factor weighs in favor of
21 dismissal.

22 As for the availability of lesser sanctions, at this stage in the proceedings there is little
23 available to the Court which would constitute a satisfactory lesser sanction while protecting the
24 Court from further unnecessary expenditure of its scarce resources. Monetary sanctions in this
25 circumstance are of little use, and given the early stage of these proceedings, the preclusion of
26 evidence or witnesses is not available. However, inasmuch as the dismissal being considered in
27 this case is without prejudice, the Court is stopping short of issuing the harshest possible sanction
28 of dismissal with prejudice.

1 Finally, because public policy favors disposition on the merits, this factor will always
2 weigh against dismissal. Id. at 643.

3 Accordingly, **IT IS HEREBY ORDERED** that:

4 1. The Clerk of Court shall randomly assign a United States District Judge to this
5 case.

6 **AND**

7 2. Based on the foregoing, **IT IS HEREBY RECOMMENDED** that:

8 (1) This case be dismissed, without prejudice, based on Plaintiff's failure to
9 obey the Court's order issued on December 1, 2021; and

10 (2) The Clerk be directed to close this case.

11 These findings and recommendations are submitted to the United States District Judge
12 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **fourteen**
13 **(14) days** after the date of service of these findings and recommendations, Plaintiff may file
14 written objections with the court. Such a document should be captioned "Objections to
15 Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file
16 objections within the specified time may result in the waiver of rights on appeal. Wilkerson v.
17 Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394
18 (9th Cir. 1991)).

19
20 IT IS SO ORDERED.

21 Dated: **March 25, 2022**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE